No. 83-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERCELL GIVENS,

Petitioner,

v.

PAULINA CASTILLO, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
P.O. Box 2223
Hereford, Texas 79045
(806) 364-3961
Attorney for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

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The Respondents, Paulina Castillo, et al., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit Court of Appeals opinion entered May 6, 1983, sub nom. *Paulina Castillo, et al.* v. *Ercell Givens*, 704 F.2d 181 (5th cir. 1983).

STATEMENT OF THE CASE

This action was brought by 44 migrant farm workers[1] who hoed weeds from Petitioner Ercell Givens' cotton

[1] Petitioner omitted the names of five workers from his petition: Manuel Pantoja, Rosalinda Pantoja, Margarita Pantoja, Pauline Pantoja, and Pauline Sue Pantoja Soto. These five workers were unable to attend trial, but their claims remain viable on remand.

fields in 1977 and 1978. Petitioner paid his cotton hoers $1.65 per hour in 1977, when the federal minimum was $2.20. When the FLSA minimum was raised by $.40 per hour in 1978, Petitioner only increased his wages by $.10 per hour to $1.75. In February, 1980, the Respondent farm workers filed suit against Defendant Givens in the Northern District of Texas, alleging that he had failed to pay them the minimum wage in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206, and had failed to maintain wage records of their work as required by the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. § 2050c. The case was tried to a jury and judgment was entered for Petitioner based on the jury's answers to nine interrogatories. The Fifth Circuit Court of Appeals reversed, holding that undisputed facts established Petitioner's liability for both the FLSA minimum wage claim and the FLCRA record-keeping claim. The court of appeals found Petitioner's violation of FLSA was wilfull as a matter of law. It also found that the district court committed plain error in its instructions to the jury regarding the hours of work performed by Respondents. The court of appeals remanded the case to the district court for a new trial of the number of hours and for assessment of FLCRA and FLSA damages.

REASONS FOR DENYING CERTIORARI

A. The Fifth Circuit Opinion Does Not Conflict With Opinions Of This Court Or Other Courts Of Appeal

The court of appeals found that the facts of this case were genuinely undisputed and that those undisputed facts established Petitioner's liability as a matter of law. In reaching this conclusion of law the court correctly applied well-settled FLSA case law. Petitioner does not claim, nor can he, that any of the appeals court's rulings of law conflict with any decision of this Court or with any

decision of another court of appeals addressing the same issues. Similarly, the court of appeals' rulings of law with respect to the Farm Labor Contractor Registration Act are fully consistent with every other federal appeals court decision to have addressed those same FLCRA issues. A brief examination of each of the questions for review bears out the conclusion that the court of appeals opinion raises no novel questions or conflicts of law.[2]

Question 1: Petitioner argues that Respondent Manuel Tonche cannot simultaneously be an employee for purposes of FLSA and a farm labor contractor for purposes of FLCRA. However, there is nothing inconsistent in this finding. FLSA and FLCRA are distinct statutes, each with its own definitional structure. *Compare* 29 U.S.C. § 203 with 7 U.S.C. § 2042. Independent contractor status for purposes of FLSA is entirely different from and unrelated to farm labor contractor status for purposes of FLCRA. *Rivera* v. *Adams Packing Co.*, 707 F.2d 1278

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[2] Although the court of appeals reversed the jury because the facts were undisputed, the jury verdict was also reversible because it was clearly the product of confusion, bias, or other improper motive. For example, even though Petitioner conceded in his closing argument that Respondents were engaged in the production of goods for commerce [Tr. 812-813], the jury found that Respondents were not so engaged [Special Issue 1] [The district court found there was no evidence to support this jury finding]. The jury also found that the Respondents who hoed cotton fields during the summer were not "migrant workers" [Special Issue 6] even though the court's instructions defined that term to include persons "who perform agricultural labor on a seasonal or other temporary basis." [R.312] [The district court also rejected this jury finding]. In Special Issue 8 the jury found that Petitioner *did* maintain elaborate wage records of each Respondent despite the fact that Petitioner admitted on the stand that he kept no wage records whatsoever [Tr. 210-211, 279]. The jury's findings with regard to hours of work were completely at odds with the evidence as well. See footnote 4, infra.

(11th Cir. 1983); *Marshall* v. *Presidio Valley Farms, Inc.*, 512 F.Supp. 1195, 1197 (W.D. Tex 1981). Under FLCRA, a farm labor contractor is defined as a person who engages in contracting activity for a fee. This definition includes all persons who engage in such activity, whether or not they are employers, employees or independent contractors for FLSA purposes. 7 U.S.C. § 2042(b). FLCRA anticipates that some farm labor contractors will also be farm employees. Pursuant to § 2042(b)(3) certain farm employees who engage in contracting on no more than an incidental basis are exempt from registering as farm labor contractors. By implication, farm employees who engage in contracting for a fee on more than an incidental basis must register as labor contractors despite their employee status. Manuel Tonche was just such an employee-labor contractor. See *Marshall* v. *Buntings Nurseries, Inc.*, 459 F.Supp. 92, 100 (D.Md. 1978); *Usery* v. *Golden Gem Growers*, 417 F.Supp. 857, 862 (M.D. Fla. 1976); *Presidio Valley Farms, Inc.*, *supra*.

Question 2: The employment relationship in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947) is indistinguishable from that between Petitioner and Manuel Tonche, and the holding in that case compels a finding that Manuel Tonche was an employee of Petitioner. The petition for certiorari relies on a few isolated factors to argue that Tonche was an independent contractor. However, *Rutherford Foods* makes clear that employee status is not to be determined by isolated factors, but by the circumstances of the whole activity. *Id.* at 730. The undisputed circumstances in this case, regarded as a whole, "permit no conclusion but that Manuel Tonche was Ercell Givens' employee." 704 F.2d at 199 (Higgenbotham, J., concurring). The court of appeals' decision that the factors cited by Petitioner were insufficient to alter Tonche's

status as an employee followed both Supreme Court and Fifth Circuit precedent. *Goldberg* v. *Whitaker House Coop*, 366 U.S. 28 (1961) (freedom to set own hours of work consistent with employee status); *Rutherford Food*, *supra* (leader of crew with authority to hire, fire and pay crew members is an employee); *Fahs* v. *Tree Gold Crop Growers of Florida*, 166 F.2d 40, 44 (5th Cir. 1948) (same); *Usery* v. *Pilgrim Equipment*, 527 F.2d 1308 (5th Cir. 1976) (worker with right to hire and pay assistants is employee); *Mednick* v. *Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975) (worker with the right to hire, fire, and pay sub-employees is himself an employee not an independent contractor). There is simply no support in law or fact for Petitioner's claim that an illiterate cotton hoer who acted as crew foreman, but who was told by Petitioner which weeds to hoe and what fields to work in, and who worked exclusively for Petitioner for the same $1.65 per hour paid to all of Petitioner's other cotton hoers, was an independent business man exercising the initiative, judgment, or foresight of the typical independent contractor. *Rutherford Foods*, supra. The court of appeals' conclusion that Manual Tonche was an employee of Petitioner was compelled by twenty-five years of FLSA precedent and does not merit review by this Court. *Cf. Hodgson* v. *Griffin and Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973), cert. den. 414 U.S. 818.

Question 3: The Petitioner complains that the court of appeals erroneously applied a "knew or should have known" definition of wilfullness for purpose of FLSA, 29 U.S.C. § 255. However the definition applied by the court adheres to the standard set forth in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. den. 409 U.S. 948 (1972), and other Fifth Circuit precedents, *Brennan* v. *Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *Marshall* v. *A & M Consolidated Indep. School*

Dist., 605 F.2d 186, 191 (5th Cir. 1979). Moreover, a "knew or should have known" definition of wilfullness, far from being a departure from settled law as argued by Petitioner, has been adopted by at least five other circuit courts. *Marshall* v. *Erin Food Service, Inc.*, 672 F.2d 229, 231 (1st Cir. 1982); *Donovan* v. *Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2nd Cir. 1983); *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1113-1114 (4th Cir. 1981); *Marshall* v. *Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1092 (9th Cir. 1981); *Mistretta* v. *Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980). See also *Marshall* v. *Root's Restaurant, Inc.*, 667 F.2d 559, 561 (6th Cir. 1982).

Question 4: Petitioner argues that the court of appeals applied an erroneous standard for determining whether Petitioner's violation of FLCRA was "intentional." See 7 U.S.C. § 2050a. However, the definition of "intentional" adopted by the court is identical to that adopted by every other circuit to have addressed the issue. *Alvarez* v. *Joan of Arc*, 658 F.2d 1217 (7th Cir. 1981); *Alvarez* v. *Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983); *Rivera* v. *Adams Packing Co.*, 707 F.2d 1278, 1283 (11th Cir. 1983). These cases hold, as did the court below, that an "intentional" violation does *not* require a specific intent to violate FLCRA. Rather, all that need be shown is that the act which constitutes or causes the violation was a conscious or deliberate act. By his own admission, Petitioner's decision not to keep wage records was a deliberate and conscious decision and was, therefore, intentional for purposes of FLCRA.[4]

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[4] In response to a question from his own attorney Defendant stated, "it wasn't my intention to keep up with any records, and I never did during the time [Manuel Tonche] worked for me." [Tr. 278-279].

Questions 5 and 6: The district court's instruction with respect to the burden of proof for determining the hours of Respondents' work was clearly erroneous in light of the standard set forth in *Anderson* v. *Mt. Clemons Pottery Co.*, 328 U.S. 680 687-688 (1945) and Fifth Circuit precedent, *Skipper* v. *Superior Dairies*, 512 F.2d 409, 420 (5th Cir. 1975); *Shultz* v. *Hinojosa*, 432 F.2d 259, 261 (5th Cir. 1970). The court of appeals concluded that the error could have affected the verdict and, therefore, properly remanded the case for a new trial of the hours of work. Petitioner does not contest the court's ruling with respect to the burden of proof; he merely argues that the instruction given by the district court was adequate. However, the record leaves no doubt that the instruction given was not clear, and that the jury was confused about the burden of proof to Respondents' detriment.[4]

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[4] Despite Petitioner's failure to impeach Respondents' testimony, 704 F.Ed at 195 n. 29, the jury found that twenty-one of the Respondents worked zero hours during the time Respondents testified they were working. For example, Plaintiff Refugia Gamez testified that she worked the whole season in both 1977 and 1978 [Tr. 601-604]. The Defendant made no attempt to contradict or impeach her testimony on cross examination or through other evidence [Tr. 606-607]. Nevertheless the jury found that Ms. Gamez did not work at all. Plaintiff Hilario Garcia testified that he and seven members of his family worked for two months in 1977. Nothing in Defendant's cross examination impeached that claim [Tr. 479-484]. Yet, the jury found no hours of work. This result cannot be explained as a credibility determination since the jury credited Mr. Garcia's testimony concerning work in 1978. Perhaps most surprising of all was the jury's conclusion that while some of the crew members worked more than 290 hours in 1977, Manuel Tonche, the man who supervised the crew every day, only worked 30 hours. That result is all the more strange in light of the fact that the jury found Manuel Tonche worked the most hours of any crew member in 1978. No theory of evidence can account for these findings or the findings with respect to the other plaintiffs. The court of appeals' decision to remand for a new trial of the hours of work was clearly supported by the record.

In sum, the court of appeals' opinion correctly applies settled law to undisputed facts. Petitioner does not identify any novel question of law or conflict in decisions which would warrant consideration by this Court.

B. The Issues Involved In This Case Do Not Warrant Consideration By This Court.

The Farm Labor Contractor Registration Act was repealed effective April 13, 1983. It was replaced by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. § 1821 et seq., which utilizes a different definitional structure from FLCRA. It would serve no purpose to grant certiorari to interpret a moribund statute. Nor would it serve any purpose to review the FLSA issues in this case, all of which are matters of well-settled law.

C. Petitioner Seeks To Have This Court Weigh Facts Applicable Only To The Litigants In This Case.

The petition for certiorari seeks to have this Court review the individual facts of this case. The Fifth Circuit found the facts to be genuinely undisputed. Petitioner argues that the court of appeals invaded the province of the jury by making credibility determinations and by ignoring "ample and abundant evidence" in support of the jury's verdict. Petitioner's argument is without merit. Nowhere in his petition does he cite a single disputed fact or instance where the court of appeals made credibility determinations.[5] More importantly, it is contrary to the public interest for this Court to exercise certiorari jurisdiction to sift through the facts of this case to deter-

[5] The facts were undisputed for the simple reason that none of the Respondents had personal knowledge of the relevant facts other than their hours of work. Only the Petitioner and Manuel Tonche knew the terms of their work agreement and the Petitioner's record keeping

mine the extent to which they are "undisputed" or "ample and abundant." It is clear from the Fifth Circuit's detailed opinion that the court conducted an exhaustive review of the evidence before reaching its conclusion that the facts were undisputed. The court of appeals' decision is fair and just. A further review of the evidence by this Court would affect no one other than the parties to this litigation, have no precedential value, and serve no purpose.

CONCLUSION

For all of the foregoing reasons the petition for a writ of certiorari to review the opinion of the Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
P.O. Box 2223
Hereford, Texas 79045
(806) 364-3961
Counsel for Respondents

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practices. Because Tonche died before trial, Respondents had to rely entirely on Petitioner's testimony on these issues. The Fifth Circuit's opininon is, as a result, based almost exclusively on the Petitioner's admissions.